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REPORTS

OF MALAYSIAN, SINGAPORE AND BRUNEI CASES DETERMINED IN THE HIGH COURTS, THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

PRIVY COUNCIL REPORTS

HARRY LEE WEE v. LAW SOCIETY OF SINGAPORE*

[P.C. (Lord Keith of Kinkel, Lord Elwyn-Jones, Lord Bridge of Harwich, Lord Brightman and Lord Templeman) November 5 & 7, December 3, 1984]

[Privy Council Appeal No. 14 of 1984]

Legal Profession – Solicitor – Disciplinary proceedings – Suspension for two years – Subsequent disciplinary proceedings – Facts substantially the same – Autrefois convict and acquit – Abuse of disciplinary process – Legal Profession Act (Cap. 217), ss. 84, 85, 91–93, 94.

In this case the appellant was an advocate and solicitor practising under the name of Braddell Brothers, of which firm he was the sole proprietor.

In February 1976 he found that a legal assistant in his employment called Santhiran had misappropriated monies from his firm's clients' account amounting to just short of $300,000. When he discovered the defalcations, the appellant did not make any report to the Law Society or to the Police. Santhiran continued in the employment of the appellant and made restitution of substantially the whole of the sums he had taken. It was only later that the appellant reported to the Law Society and the police. The first disciplinary proceedings against the appellant were commenced by the Inquiry Committee in 1978 and subsequently the Council of the Law Society having received the findings of the Inquiry Committee applied to the Chief Justice for the appointment of a Disciplinary Committee to investigate the appellant's failure to report the criminal breach of trust committed by Santhiran to the Law Society earlier. Meanwhile the appellant was charged and convicted of offences under s. 213 of the Penal Code of accepting restitution of property to himself in consideration of concealing an offence. The Inquiry Committee commenced the second disciplinary proceedings based on the conviction. The appellant applied to have the inquiry adjourned pending his appeal against the conviction but this was refused.

The disciplinary proceedings on the first charge were heard in the High Court on March 16, 1981 and the appellant was suspended for two years. The appellant's appeal against his conviction was dismissed.

With the coming into force of the Legal Profession Act, a new Inquiry Committee was appointed to inquire into the second charge and eventually the proceedings were heard by the High Court on 21st and 22nd February 1983. An order was made that the appellant be suspended from practice for two years (see [1984] 1 M.L.J. 331). The appellant appealed against this order.

The essence of the appellant's attack on the second order was as follows. Both sets of disciplinary proceedings arose from exactly the same conduct by the appellant and although it was possible to attach a different label in each case to the particular form of professional misbehaviour alleged, the gravamen of the complaint against him in each case was either identical or so nearly so as to entitle him either to rely on the principle of *autrefois convict* or on the closely analogous principle that the unnecessary duplication of proceedings was an abuse of process which the Court has an inherent jurisdiction to restrain.

Held: (1) the doctrine of *autrefois convict* and *acquit* is applicable to disciplinary proceedings under a statutory code by which a profession is governed. The principles laid down in *Connelly* v. *Director of Public Prosecutions*(1) are apt to apply to the circumstances in this case and enable the appellant to rely on the order made against him in the first proceedings as a complete bar to further disciplinary action against him in the second proceedings;

(2) even if the facts cannot be brought within the strict test laid down in *Connelly* v. *Director of Public Prosecutions*(1), the second proceedings in this case brought by the Law Society against the appellant following the first proceedings were an abuse of the disciplinary process.

Case referred to:

(1) *Connelly* v. *Director of Public Prosecutions* [1964] A.C. 1254.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

C. Ross Munro Q.C. (Alan Newman with him) for the appellant.

Chelva Rajah (Imran Hamid with him) for the respondent.

Cur. Adv. Vult.

Lord Bridge of Harwich (delivering the Judgment of the Board): On 7 November last at the

* See correspondence at p. xiii, *supra*.

conclusion of the arguments in this appeal, their Lordships announced that they would allow the appeal and set aside the order of the High Court of Singapore dated January 31, 1984 that the appellant be suspended from practice as an advocate and solicitor of the Supreme Court for a period of two years. Their Lordships now give the reasons for their decision.

The disciplinary code governing proceedings against advocates and solicitors in Singapore is found in Part VII of the Legal Profession Act. The Supreme Court may order a member of the profession ". . . on due cause shown to be struck off the roll or suspended from practice for any period not exceeding two years or censured": section 84 (1). Such due cause may be shown by proof, *inter alia*, that he:–

"(a) has been convicted of a criminal offence, implying a defect of character which makes him unfit for his profession; or

(b) has been guilty of . . . grossly improper conduct in the discharge of his professional duty": section 84 (2).

The jurisdiction of the Court under section 84 is invoked by an originating summons under section 98 instituting what are commonly referred to as show cause proceedings. But at two earlier stages there will have been, first, an inquiry into the matter of complaint against the solicitor (a single word which, for brevity, it will be convenient to use to describe a member of the fused profession) by the Inquiry Committee appointed under section 85, secondly an investigation and findings by a Disciplinary Committee under sections 91 to 93. It is on the basis of findings adverse to the solicitor by a Disciplinary Committee that the Law Society is required by section 94(1) to institute show cause proceedings.

In the present case the appellant was first ordered to be suspended from practice for two years by an order of the Court dated August 27, 1981 based on findings by a Disciplinary Committee in a report dated November 19, 1980 of what amounted to grossly improper conduct in the discharge of his professional duty. An appeal against that order to this Board was dismissed on July 13, 1982. The appellant completed his two year period of suspension and resumed professional practice on August 27, 1983. But as long ago as August 26, 1981 another Disciplinary Committee had made a finding against him that he had been convicted of a criminal offence, implying a defect of character which made him unfit for his profession. It was on the finding of that Disciplinary Committee that the Court based its order for a further suspension for two years from January 31, 1984 which their Lordships have now set aside.

The essence of the appellant's attack on the second order can be shortly stated. Both sets of disciplinary proceedings arose from exactly the same conduct by the appellant and although it was possible to attach a different label in each case to the particular form of professional misbehaviour alleged, the gravamen of the complaint against him in each case was either identical or so nearly so as to entitle him either to rely on the principle of *autrefois convict* or on the closely analogous principle, applicable alike to criminal and civil litigation, that the unnecessary duplication of proceedings is an abuse of process which the Court has an inherent jurisdiction to restrain.

It is necessary to examine the deplorably long history of this matter in some detail.

From 1975 to 1977 the appellant was the President of the Singapore Law Society. He practised under the name of Braddell Brothers, of which firm he was the sole proprietor. In February 1976 he found that a legal assistant in his employment named Santhiran had misappropriated monies from his firm's clients' account amounting to just short of $300,000. If this sum was not made good by Santhiran, the liability to reimburse the clients would, of course, have fallen on the appellant. But in fact by June 10, 1976 Santhiran had made restitution to the appellant of substantially the whole of the monies he had taken. Santhiran continued in the employment of the appellant until December 21, 1976. In January 1977 Santhiran commenced practice on his own account.

Following the discovery by the appellant of Santhiran's defalcations, the appellant not only made no report of the matter to the Law Society or to the police, but also brought in an outside firm of accountants to conduct the relevant investigation, in order to conceal what had happened from his own regular auditors. It was only after those auditors had discovered what had happened that the appellant was virtually forced to report Santhiran to the Law Society and the police, as he did in April and May 1977 respectively. Santhiran was in due course pro-

secuted for, and convicted of, criminal breach of trust and was later struck off the roll.

The first disciplinary proceedings ("the delay proceedings") were commenced by the Inquiry Committee of its own motion writing to the appellant on March 18, 1978 that they proposed to inquire into his delay in reporting Santhiran. The appellant gave a written explanation and also appeared before the Inquiry Committee in May 1978. After the Inquiry Committee had reported its findings to the Council of the Law Society, the Council informed the appellant in a letter dated July 20, 1978 that the Council would apply to the Chief Justice for the appointment of a Disciplinary Committee to investigate the appellant's "failure to report the criminal breach of trust committed by Santhiran when he was a legal assistant in the firm of Braddell Brothers to the Law Society earlier".

Meanwhile, the appellant was charged on June 6, 1978 with nine offences under section 213 of the Penal Code of "accepting restitution of property to himself" – the monies repaid by Santhiran – "in consideration of his concealing an offence" – Santhiran's criminal breach of trust. He was convicted on all nine charges by the District Court on November 7, 1978.

On December 13, 1978 the Inquiry Committee, again of its own motion, commenced the second disciplinary proceedings ("the conviction proceedings") by a letter to the appellant indicating its intention to inquire into ". . . your conduct arising out of your conviction on November 7, 1978, in the District Court, Singapore, on nine charges under section 213 of the Penal Code" and expressing the view that ". . . the convictions imply a defect of character making you unfit for the profession under section 84(2) (a) of the Legal Profession Act". On the very same day the Chief Justice appointed a Disciplinary Committee to investigate the allegation of misconduct in the delay proceedings.

On April 12, 1979 the appellant requested the Inquiry Committee to adjourn their inquiry in the conviction proceedings on the ground that he was intending to appeal against the convictions. This request was not granted. Instead, the Inquiry Committee proceeded to a hearing on May 14, 1979. Inexplicably, the Inquiry Committee then failed to report to the Council of the Law Society as was their duty under section 87 of the Legal Profession Act. The High Court drew the inference that this inaction was in response to the appellant's request for an adjournment. Their Lordships cannot agree. The time for the Inquiry Committee to adjourn, if they were so minded, was before, not after, making their inquiry. What should have happened after the inquiry and the making of a report by the Inquiry Committee in the conviction proceedings, since both sets of disciplinary proceedings were so obviously concerned with the same subject matter, was that the conviction proceedings should have been referred to the same Disciplinary Committee as had already been appointed by the Chief Justice in the delay proceedings. Thereafter there would have been two sensible options. Either the disciplinary proceedings in both matters could have been adjourned pending the final disposal of the appellant's appeal against his criminal convictions; alternatively, if it was felt that the disciplinary proceedings should not, for the good of the profession, be unreasonably delayed, it appears to their Lordships that there was no good reason why the disciplinary proceedings in both matters should not have been prosecuted by the Law Society concurrently, with the pursuit by the appellant of such remedies as were open to him by way of appeal against his convictions under section 213 of the Penal Code, provided always that it was recognised that no order against the appellant should be pronounced in the eventual show cause proceedings until his criminal appellate remedies had been exhausted.

The subsequent course both of the delay proceedings and of the appellant's attempts to overturn his convictions on appeal may be shortly summarised. The Disciplinary Committee's investigation in the delay proceedings was held between September 23 and October 2, 1980. The Disciplinary Committee reported adversely to the appellant on November 19, 1980. The Law Society instituted show cause proceedings on January 31, 1981. The hearing in the High Court was on March 16, 1981. As already stated, the High Court gave judgment ordering the appellant's suspension for two years on August 27, 1981. Meanwhile the appellant's appeal against his convictions under section 213 of the Penal Code from the District Court to the High Court was heard on March 12, 1980. His appeal was allowed on one of the nine charges against him but dismissed on the remaining eight. An application for special leave to appeal to the Court of Criminal Appeal was dismissed on September 1, 1980.

A petition for special leave to appeal to this Board was dismissed on May 20, 1981. Comparison of these dates shows that if the second alternative course described in the foregoing paragraph had been taken the disciplinary proceedings in both matters could have been disposed of, as in the delay proceedings they were, by August 27, 1981.

It is now necessary to return to the history of the course taken by the conviction proceedings. As already stated, the Inquiry Committee which had held a hearing on May 14, 1979 never made any report. On October 15, 1979 an amendment to section 85 of the Legal Profession Act came into operation which, *inter alia,* transferred the power of appointment of the Inquiry Committee from the Council of the Law Society to the Chief Justice and a new Inquiry Committee was duly appointed.

The High Court, in their judgment, expressed the view that in relation to the conviction proceedings the old Inquiry Committee thereupon became *functus officio.* Their Lordships doubt the correctness of this. Once the old Inquiry Committee were seised of the matter, it would seem that they were conducting "an investigation" which, by the operation of section 16(e) of the Interpretation Act, would not be affected by the amendment of section 85 of the Legal Profession Act, and which they would be entitled and bound to continue to a conclusion. However, since nothing turns on the point, it is unnecessary to express a concluded view about it. What in fact happened was that the inquiry machinery was set in motion *de novo* by a complaint from the Council of the Law Society to the new Inquiry Committee dated March 19, 1980. Nothing was done by the Committee until September 27, 1980, when they wrote to the appellant inviting his explanation and asking if he wished to be heard. The appellant was heard by the new Inquiry Committee on November 19, 1980 and the Committee reported to the Council on November 22, 1980. When notified by the Council of the proposal to seek the appointment of a second Disciplinary Committee (the first Disciplinary Committee having, it will be recalled, just reported) the appellant, through his solicitors, naturally protested at the duplication of proceedings and urged that any show cause proceedings based on the first Disciplinary Committee's report should be deferred until after the second Disciplinary Committee had reported. In the light of the subsequent history the reply, dated January 21, 1981, on behalf of the Law Society deserves to be quoted. The material paragraph reads as follows:—

> "I am instructed to say that under the Legal Profession Act, the Council of the Law Society is obliged to proceed with an application requiring the solicitor concerned to show cause, on receipt of the findings of the Disciplinary Committee. The Council cannot see any reason in this case for deferring an application to the court requiring your client to show cause until the Disciplinary Committee investigating the conviction has issued its report."

The second Disciplinary Committee made its report, adverse to the appellant, on August 26, 1981. In the light of the attitude of the Law Society expressed in the letter of January 21, 1981, its conduct following receipt of the second Disciplinary Committee's report was astonishing. There now followed a delay until August 10, 1982 before the second show cause proceedings were instituted. Counsel appearing for the Law Society before the Board was able to offer no explanation whatever for this delay. Considering that this delay for nearly a year in seeking a further disciplinary order against the appellant corresponded almost precisely with the first year of his suspension under the existing order, their Lordships regard it as wholly lamentable.

The second show cause proceedings were heard by the High Court (Wee Chong Jin C.J., Sinnathuray and Chua JJ.) on 21st and 22nd February 1983. Their Lordships are fully conscious of the very heavy burden of work which devolves upon the higher judiciary in Singapore. They must nevertheless express their regret and concern that in a case of this gravity, where a professional man's livelihood was at stake, and against the background of the history already recounted, the Court should not have been able to deliver their judgment until January 31, 1984 when nearly another year had elapsed.

To complete the story, on March 12, 1984 the appellant was granted leave to appeal to this Board (to which he was entitled as of right) by the Court of Appeal, but his application for a stay of execution of the second suspension order was successfully opposed by the Law Society.

The primary facts relating to the appellant's failure to report Santhiran's criminal conduct until many months after Santhiran had made substantial restitution have already been re-

counted. The first Disciplinary Committee made an emphatic finding as to the appellant's motivation for his failure to report the matter in the following terms:-

"We find that the evidence produced before the Committee very clearly leads to the irresistible inference that the motive for the Respondent's elaborate scheme for delaying the report was the intention to recover the misappropriated monies from Santhiran."

While this is explicitly found, it is also clearly implicit in the findings of the first Disciplinary Committee that Santhiran's motivation for making restitution must have been based on the expectation that he would not be reported, which could only have been induced by the appellant.

Here then is the whole substance of the "grossly improper conduct in the discharge of his professional duty" by the appellant which is the subject of the first suspension order. To induce Santhiran to make restitution of the monies he had misappropriated the appellant omitted to report him. To secure that advantage Santhiran was willing to and did make restitution.

What was required to translate the language appropriate to describe this misconduct by the appellant into the language which rendered him guilty of offences under section 213 of the Penal Code, that he "accepted restitution of property to himself *in consideration* of his concealing an offence" (emphasis added). The labels to describe the two aspects of professional misconduct differ, falling as they do, under paragraphs (a) and (b) of section 84 (2) of the Legal Profession Act. It was argued for the Law Society that the added element of a bargain between the parties was an essential element of the criminal offence but not of the misconduct alleged in the delay proceedings and therefore provided a crucial distinction which justified separate disciplinary proceedings in respect of the two matters of complaint. This appears to their Lordships a technicality wholly without merit. The inference of a bargain between the parties was already inherent in the facts as found by the first Disciplinary Committee as an essential ingredient in the professional misconduct on which the first show cause proceedings were based.

No one would dispute that the doctrine of *autrefois convict* and *acquit* is applicable to disciplinary proceedings under a statutory code by which any profession is governed. The doctrine was exhaustively considered by the House of Lords in *Connelly* v. *Director of Public Prosecutions*[1] . In a well known passage from his speech in that case Lord Morris of Borth-y-Gest set out nine propositions which in his view "both principle and authority establish". Their Lordships quote only those of most direct relevance to the instant case as follows:-

"(1)that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted; (2) . . . (3) that the same rule applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted; (4) that one test as to whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty; (5) . . . (6) that on a plea of *autrefois acquit* or *autrefois convict* a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same, or is substantially the same, as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted."

If the language of these propositions is suitably modified to apply to professional disciplinary proceedings instead of criminal trials on indictment, they are clearly apt to apply to the circumstances under consideration in the instant case and enable the appellant to rely on the order made against him in the delay proceedings as a complete bar to further disciplinary action against him in the conviction proceedings.

In *Connelly's case* Lord Devlin expressed a somewhat different view of the scope of the doctrine of *autrefois convict* and *acquit* from that of Lord Morris of Borth-y-Gest. He said:—

"For the doctrine of *autrefois* to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law . . .

My noble and learned friend in his statement of the law, accepting what is suggested in some dicta in the authorities, extends the doctrine to cover offences which are in effect the same or substantially the same . . . . I have no difficulty about the idea that one set of facts may be substantially but not exactly the same as another. I have

more difficulty with the idea that an offence may be substantially the same as another in its legal characteristics; legal characteristics are precise things and are either the same or not. If I had felt that the doctrine of *autrefois* was the only form of relief available to an accused who has been prosecuted on substantially the same facts, I should be tempted to stretch the doctrine as far as it would go. But, as that is not my view, I am inclined to favour keeping it within limits that are precise."

It is not altogether easy to discover from the speeches of Lord Reid, Lord Hodson and Lord Pearce whether Lord Morris of Borth-y-Gest or Lord Devlin should be taken as expressing the majority view on this issue. But it is unnecessary for their Lordships to express any conclusion in that regard.

If the facts here cannot be brought within Lord Devlin's strict test, they are certainly covered by the alternative form of relief which he favoured as mitigating the rigour of his strict test. The alternative approach is explained at length in the latter part of Lord Devlin's speech and leads clearly to the conclusion in the present case that the conviction proceedings brought by the Law Society against the appellant following the delay proceedings were an abuse of the disciplinary process.

It was for these reasons that their Lordships decided that this appeal must be allowed. The Law Society must pay the appellant's costs before the second Disciplinary Committee, in the show cause proceedings, and before this Board. Having regard to the inordinate delay in instituting the second show cause proceedings after receipt of the Disciplinary Committee's report and to the Law Society's opposition to a stay of execution, their Lordships think it appropriate that all costs ordered to be paid to the appellant should be taxed, if not agreed, as between solicitor and client.

Appeal allowed.

Solicitors: *Kingsford Dorman; Linklaters & Paines.*

CHNG BOON HUAT v. COMPTROLLER OF INCOME TAX

[P.C. (Lord Diplock, Lord Keith of Kinkel, Lord Brandon Of Oakbrook, Lord Brightman, Lord Templeman) July 19, 1984]

[Privy Council Appeal No. 1 of 1982]

Revenue Law – Income Tax – Appeal against assessments – Whether gains from trade of property developer – Decision of fact – Income Tax Act (Cap. 114), s. 10(1)(a).

This was an appeal from the judgment of the Court of Appeal ([1982] 1 M.L.J. 112). The appellant was assessed in 1972 for income tax upon profits for the sale of land in 1966 and 1968. The issue was whether he was carrying on a trade or business dealing in land at the time of each of those sales. The Board of Review held that he was. The High Court and the Court of Appeal upheld the decision of the Board of Review.

Held, dismissing the appeal: the principle laid down in *Edwards* v. *Bairstow* (1) applied in Singapore.

Case referred to:

(1) *Edwards* v. *Bairstow* [1956] A.C. 14.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Lim Chor Pee for the appellant.

D. C. Potter Q.C. (Mrs. Lucy Hangchi with him) for the respondent.

Lord Diplock (delivering oral judgment): The appellant was assessed in 1972 for income tax upon profits for the sale of land in 1966 and 1968. The only issue was whether he was carrying on a trade or business dealing in land at the time of each of those sales.

The Board of Review held that he was and disbelieved him when he said that his intention throughout the period that he held a larger area of land of which the portions sold formed part was to construct flats and houses as an investment.

The principle laid down in this country and applied also in Singapore is that laid down in *Edwards* v. *Bairstow*(1). The judge and the Court of Appeal asked themselves the right question: could a reasonable tribunal reach that decision of fact? Their Lordships agree that it could and indeed doubt whether any other conclusion could be reached.

Their Lordships will accordingly dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Douglas Goldberg & Co.; Jaques & Lewis.*